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No. 83-2097

In the Supreme Court of the United States

OCTOBER TERM, 1984

BURGER KING CORPORATION, a
Florida Corporation,
Appellant,

vs.

JOHN RUDZEWICZ,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

REPLY BRIEF OF APPELLANT

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OCTOBER TERM, 1984

BURGER KING CORPORATION, a
Florida Corporation,
Appellant,

vs.

JOHN RUDZEWICZ,
Appellee.

On Appeal From the United States Court
of Appeals, Eleventh Circuit

REPLY BRIEF OF APPELLANT

STATEMENT OF THE CASE

The Appellee's Brief is largely unresponsive to the arguments and authorities offered in the Brief of Appellant—and we will not burden the Court by repeating unanswered points; dismissing irrelevancies, false starts and non sequiturs; or listing the many factual assertions offered without citation to the Record. Instead, we hope to focus again upon our central thesis, and the evidence and authorities supporting it.

In that context, we disagree strongly with the appellee's assertion (brief at 8-11) that the franchisees' relationship with Burger King was confined to their dealings with the Michigan regional office.[1] Although Mr. Rudzewicz

1. Burger King Corporation is a wholly-owned subsidiary of the Pillsbury Company.

quotes extensively from the circuit court's opinion on this point, he offers almost no evidentiary support in the Record. He claims that *only* the Michigan office "supervised" the franchise (brief at 8), but cites for this strong proposition only a set of letters proving that before the franchisees signed on with Burger King, the Michigan office had hired a Detroit real estate broker to sell the property (X. P; Tr. 343-44, 600)—an unremarkable event; and in addition his own angry letter to the regional office, threatening not to open the store unless he received certain information (X. T.; Tr. 354, 362). Of course, neither exhibit proves the point.[2]

To the contrary, as we observed (brief at 13 n.11, 19), there was a parallel course of direct contact between the franchisees and the Miami headquarters, relating to the critical policy differences which became the subject matter of the eventual litigation. We noted the evidence that the regional office performed only ministerial functions, and that the franchisees knew it (Brief of Appellant at 13 n. 11).[3] It was the Miami headquarters which made the key negotiating decisions, and which took over direct control when the franchisees breached the contract.

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2. In addition, Mr. Rudzewicz points out correctly that his first discussions about owning the franchise took place in Michigan; that his co-franchisee Brian MacShara actually met with Burger King's people only in Michigan (Tr. 506); that the prospective franchisees were interviewed in Michigan; that they signed all documents in Michigan; that Burger King was registered with the State of Michigan; that Mr. Rudzewicz never physically traveled to Florida; and of course that the restaurant was operated in Michigan (brief at 9-11). None of these observations, however, establishes the circuit court's conclusion that the franchisees dealt *only* with the Michigan office.

3. Mr. Rudzewicz himself quotes in his brief (p. 12) the circuit court's acknowledgement that the Michigan office was powerless to alter the amount of rent (J.A. 169-70).

Moreover, it was the Miami headquarters which defined the inherent nature of this franchise, through the four key documents which were created in Miami and sent directly to the franchisees from Miami, discussed in our initial brief at 4-12. As we noted, these documents not only establish a long-term interdependent relationship, and reveal *that relationship* (as opposed, for example, to the mere provision of goods) to be the principal object of the contract, but also identify the Miami headquarters as the focal point of that relationship—its creator, enforcer, and arbiter. They regulate the finest details of the franchise, from packaging to menus, uniforms, signs and equipment (Brief of Appellant at 9). They do so in the recognition that "[u]niformity of service, appearance, and quality of product is essential to the preservation of the Burger King image and the benefits accruing therefrom to both Franchisee and Franchisor" (J.A. 31).[4] They create a substantial enforcement mechanism, in Burger King's right of physical inspection and an accounting (Brief of Appellant at 9-10). And they identify the Miami headquarters as the enforcement authority—the office which receives all notices, computes and receives all payments, and conducts any arbitration—all in the context of agreements which call for the application of Florida law (Brief of Appellant at 10-11 & n.6). As the first offering circular advised the prospective franchisees, "[t]he business activities of Burger King Corporation are conducted by the officers and directors of the corporation all of whom may be contacted at [the Miami address]" (J.A. 11).

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4. As Mr. Rudzewicz himself acknowledges (brief at 6), his desire was not simply to sell hamburgers in Michigan, but to sell "Whoppers." Whoppers are not simply hamburgers. As a product of promotions and services throughout the United States, they are nationally recognized as *Burger King* hamburgers.

Even if the franchisees had dealt personally only with representatives of the Michigan office, these documents alone would have put them on notice that the Michigan people were simply functionaries, and that Miami called the shots. When these documents are coupled with the evidence that the franchisees did indeed deal directly with officials of the Miami office—on the key questions in litigation—that conclusion is unassailable. Having thus reemphasized the character of this franchise relationship, we turn to the legal context in which it must be assessed.[5]

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5. Before doing so, however, we must take issue with four minor misstatements in the Appellee's Brief. First (brief at 5), Mr. Rudzewicz implies that while the lease agreement calls for the payment of rent to Miami, the franchise agreement did not. He ignores substantial evidence to the contrary (Brief of Appellant at 10 & n.6). Second (brief at 5), the appellee finds "no evidence that Rudzewicz ever mailed even one rent check to Florida." That is incorrect; a Burger King witness testified that the franchisees made at least one rental payment (Tr. 91), and of course the rent was required to be sent to Miami (J.A. 113). And despite two reminders (Jurisdictional Statement at 5 n.5; Brief in Opposition to Motion to Affirm Judgment at 4), Mr. Rudzewicz forgets his concession in the circuit court (appellant's brief at 6) that the franchisees in fact made "one or two of their rent payments for Store #775." Moreover, the franchisees made a number of other payments to Miami (Brief of Appellant at 19).

Third (brief at 7), Mr. Rudzewicz asserts with no supporting authority that he did no accounting work for the three Burger King franchises represented by his firm; but the transcript discloses only that the firm had the account—and not whether Mr. Rudzewicz worked on it (Tr. 425). Fourth (brief at 13), Mr. Rudzewicz asserts that his payments for purchases from Burger King's Distron and Davmor divisions were made to Burger King's regional office, citing only one document which proves the point for Distron. As we noted (brief at 15, 19), the Davmor division was located in Miami, billed the franchisees from Miami, and received their payments in Miami.

Finally, we must acknowledge that Mr. Rudzewicz is right to point out (brief at 10) that co-franchisee MacShara was not a member of the partnership (R.M.B.K.-2) which Mr. Rudzewicz formed for the purpose of leasing store equipment. *See* Tr. 438. Nevertheless, we stand by our contention (brief at 16 n.14, 36) that Mr. MacShara and Mr. Rudzewicz were partners in the franchise, and for that reason and others that Mr. MacShara's training in Miami is relevant to the trial court's exercise of jurisdiction over Mr. Rudzewicz.

ARGUMENT

I. This Court Has Jurisdiction Under 28 U.S.C. §1254(2) Because the Circuit Court Held That §48.193(1)(g) of the Florida Statutes—Which Confers Long-Arm Jurisdiction Upon One Who Breaches a Contract in Florida by Failing to Perform Acts Required by the Contract to Be Performed in Florida—Is Unconstitutional As Applied.

No less than five times in his brief, Mr. Rudzewicz concedes our point: "The Eleventh Circuit Court of Appeals ruled that, while Rudzewicz may have fallen within the literal grasp of Florida's long-arm statute, its application to him as an individual, under these circumstances, violated his constitutional right to due process."[6] As we consistently have emphasized (Jurisdictional Statement at 11 n.16; Brief of Appellant at 26), this Court has jurisdiction under 28 U.S.C. §1254(2) whenever a state statute has been declared unconstitutional as applied. Thus, Mr. Rudzewicz has conceded this Court's jurisdiction by direct appeal.

That concession is appropriate both because of the circuit court's disposition of this case, and because of the posture in which the case reached the circuit court. By its plain language, Section 1254(2) focuses on the disposition effected by the circuit court, allowing a direct appeal whenever a state statute has been "held by a court of ap-

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6. Appellee's Brief at 42; *see id.* at 1, 32-33, 35, 36; *see also id.* at 31, 32. Mr. Rudzewicz' point seems to be that the circuit court did not declare the statute facially invalid: "This appeal should be dismissed if this Court finds that the constitutionality of the Florida long-arm statute *per se* was not at issue, below" (brief at 1-2).

peals to be invalid . . . ."[7] Thus, if the circuit court's opinion is fairly read to have declared the Florida statute unconstitutional as applied, that outcome satisfies the statutory criteria for jurisdiction, even if the circuit court might reasonably have undertaken a saving construction—but chose not to do so.

We submit that the circuit court's opinion necessarily declares the Florida long-arm statute unconstitutional as applied. As we noted (brief at 26 & n.27), that conclusion does not depend upon the circuit court's willingness to acknowledge its holding, but on the holding itself.[8] As we

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7. Mr. Rudzewicz himself cites the decisions in *Colorado Central Consolidated Mining Co. v. Turck,* 150 U.S. 25, 36 (1893) and *Durousseau v. United States,* 10 U.S. (6 Cranch) 307 (1810), both confirming that the Court's appellate jurisdiction is defined by the statutory language. This observation is consistent with the principle noted in the initial brief (p. 25 n.25), that the statute will confer jurisdiction by virtue of the circuit court's disposition of the case, even if the constitutional question was neither raised by the appellee below nor ruled upon by the trial court. *See Jenkins v. Georgia,* 418 U.S. 153, 157 (1974), *citing Raley v. Ohio,* 360 U.S. 423, 436 (1959). Mr. Rudzewicz is correct (brief at 28, 30 n.6) that the decision in *Kulko v. Superior Court of California in and for the City and County of San Francisco,* 436 U.S. 84, 90 n.4 (1978) (hereinafter *"Kulko"*), does observe that the appellant had not challenged the constitutionality of the state statute below; but this observation is offered only as an aid to interpreting the decision under review. In light of the statute's language, the authorities cited above, and common sense, there can be no question that a finding of unconstitutionality is reviewable by direct appeal, even if offered by the circuit court on its own motion. In this case, as we argued (brief at 25 n.25), Mr. Rudzewicz' trial motion was generally sufficient to place the constitutionality of the statute at issue.

8. *Franchise Tax Board of California v. United States Postal Service,* ..... U.S. ....., 104 S. Ct. ....., 81 L. Ed.2d 446, 450 n.7 (1984) (and cases cited); *California v. Grace Brethren Church,* 457 U.S. 393, 405 (1982) (and cases cited). This point is not undermined by the Court's observation—in two cases upon which Mr. Rudzewicz relies (brief at 28, 31)—that the "opinion below does not purport to determine the constitutionality of the . . .

(Continued on following page)

argued (brief at 25-26), the circuit court's opinion begins by acknowledging Mr. Rudzewicz' concession "that his activities fall within the reach of the Florida long-arm statute . . ." (J.A. 171). Rather than revisiting that assumption, the circuit court addresses Mr. Rudzewicz' contention "that invocation of that statute under these circumstances exceeds the bounds of due process" (J.A. 172), and concludes that "[j]urisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process" (J.A. 183). Thus, whether or not the circuit court might have rejected the parties' concession that the long-arm statute does confer jurisdiction in this case, the fact is that the circuit court chose not to do so, accepting instead the issue framed by the parties, and ruling for Mr. Rudzewicz only in that context. Since section 1254(2) defines this Court's jurisdiction solely according to the circuit court's holding, that disposition necessarily created a right of direct appeal.

Finally (brief at 23-24), we argued that given its substantive conclusions, no other disposition was even available to the circuit court. Put otherwise, the parties' concession in the circuit court was appropriate, because the long-arm statute does clearly apply to the facts of this case. Mr. Rudzewicz is correct that Florida's Supreme Court has not

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Footnote continued—

jurisdictional statute." *Calder v. Jones,* ..... U.S. ....., 104 S. Ct. 1482, 79 L. Ed.2d 804, 811 n.7 (1984) (hereinafter *"Calder"*); *Kulko,* 436 U.S. at 90 n.4. In both cases a holding of unconstitutionality was not inherent in the opinion below—not simply because that opinion was ambiguous, but also because the jurisdictional statute in question was expressly drawn to be consistent with constitutional limits. In this case, as we note below, the language of the state statute does not permit an analogous construction; and in any event the circuit court's opinion is not ambiguous, but necessarily declares the statute unconstitutional as applied.

addressed the question (brief at 34, 36), but he does not deny that all five of Florida's appellate districts have construed the statute according to its plain language, and that the handful of contrary decisions make no sense (Brief of Appellant at 24 n.24). As we noted in the Jurisdictional Statement (p. 9 & n.9), Florida law requires a strict construction of jurisdictional statutes, and the plain language of this statute confers jurisdiction whenever a party assertedly has failed to perform acts required by the contract to be performed in Florida. Mr. Rudzewicz says nothing to deny that point, or the more-important point that even if an option of statutory construction had been available to the circuit court, the circuit court eschewed that option, accepted the parties' construction of the statute, and held it unconstitutional as applied.

II. The Circuit Court Erred in Holding the Statute Unconstitutional As Applied, Because Mr. Rudzewicz Purposefully Availed Himself of the Benefits and Protection of the Forum; Was Called to Answer in a Florida Court for Conduct Growing Out of That Relationship; and Was Not Unfairly Burdened by the Defense.

1. *Mr. Rudzewicz Purposefully Availed Himself of the Benefits and Protection of the Forum* (Brief of Appellant at 27-39). Our central thesis, almost entirely ignored in the Appellee's Brief, is that Mr. Rudzewicz voluntarily and purposefully created a long-term interdependent business relationship with the Burger King headquarters in Miami. In the language of the *Kulko* decision, 436 U.S. at 97, 100, 101, he "sought a commercial benefit from solicitation of business from a resident of [the forum]," derived a "personal or commercial benefit" from the contract, and displayed an "intent to obtain or expectancy of receiving a

corresponding benefit in the State . . . ."[9] We spent a good deal of space on this important point, establishing that the franchisees purposefully sought the benefits and security of an established national organization; contracted to conform their conduct to a set of meticulous national standards established and enforced in Miami; contracted three times for the application of Florida law; contracted to arbitrate if necessary in Miami; entered into agreements which clearly identified the Miami headquarters as the source of policy; engaged in a course of conduct which validated that impression; and knowingly caused economic injury in Florida. Ignoring almost all of this, Mr. Rudzewicz offers three responses.

First (Appellee's Brief at 6, 8-11), as we have noted, Mr. Rudzewicz suggests that the franchisees dealt entirely with the Michigan regional office, which for all appearances was the sole embodiment of Burger King. Almost our entire initial brief proves otherwise, and we have said already all that we can say to establish that the overwhelming evidence of record, taken in the light most favorable to the trial court's exercise of jurisdiction, demonstrates that the franchisees knowingly created a long-term relationship with Burger King's headquarters in Miami.

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9. Thus the question is not, as Mr. Rudzewicz suggests (brief at 14), whether the State of Florida conferred some tangible benefit upon him—for example the benefit of strict regulation of franchises. In the language of *Kulko*, the question is whether Mr. Rudzewicz "sought a commercial benefit from solicitation of business from a resident of [the forum]"—and not from the forum itself. By the same token, the question is not, as Mr. Rudzewicz suggests (brief at 14), whether his activities had the effect of conferring some benefit on another forum—for example by his payment of taxes and wages in Michigan. As we acknowledged (brief at 43 n.62), this case could have been brought in Michigan, and Michigan clearly has an interest in the outcome. While that interest might have supported a motion for change of venue, a point Mr. Rudzewicz has abandoned, it is not sufficient to divest the Florida court of jurisdiction if minimal constitutional requirements are satisfied.

Second (brief at 8, 12, 14-18), Mr. Rudzewicz insists that Michigan law—specifically the Michigan Franchise Investment Act (Mich. Comp. Laws Ann. §445.1501, *et seq.* (Supp. 1983-84))—and not Florida law—applies to this case. Since this is the major substantive argument advanced in the Appellee's Brief, we will consider it at some length, though mindful of the Court's repeated emphasis that the substantive choice-of-law question is not the same as the jurisdictional question (Jurisdictional Statement at 21-22; Brief of Appellant at 33 & n.43). It is relevant in this case primarily because of the franchisees' voluntary acceptance of three separate contracts calling for the application of Florida law. At the least, this acceptance put the franchisees on notice that Florida had an interest in the case, and that they might be called to answer for any breach of contract in a Florida court. Beyond that, in the context of the entire relationship, these choice-of-law provisions are a prominent acknowledgement of the importance to both parties of Burger King's regulatory responsibilities —and the institutional arrangement which that required.[10] In this light, Mr. Rudzewicz' repeated invocation of the Michigan statute is irrelevant, because the contracts in this case say nothing about that statute. What matters is that the contracts call for the application of Florida law, and that put the franchisees on notice.

Moreover, we disagree that the Michigan statute applies in this case, because Mr. Rudzewicz offers no reason for excusing his contractual obligation to comply with Florida law. This is a point which we briefed at some length in the circuit court (Brief of Appellee at 43-47),

10. In contrast, as we acknowledged (Jurisdictional Statement at 22), neither point would follow in the absence of a *contractual* choice-of-law provision, even if the standard choice-of-law analysis would call for the application of Florida law (which it does, Jurisdictional Statement at 22 n.31).

establishing that the Florida courts would honor the parties' choice of law in this case, in light of the substantial relationship between this transaction and Florida, and the absence of any conflict between the application of Florida law and the fundamental policy of another interested jurisdiction.[11] Thus, Mr. Rudzewicz has invoked the Michigan statute without demonstrating its applicability, in the face of his contractual choice of Florida law.

Finally on this point, we submit that even if the Michigan statute were applicable, that would not forestall the enforcement of Florida law on other issues. Contrary to Mr. Rudzewicz' assertion that the Michigan statute is "comprehensive" and "systematic" (brief at 15), it is neither. It purports to regulate not the conduct of a franchise but only "the offer, sale, and purchase of franchisees . . .";[12] it prohibits certain practices only "in connection with the offer, sale, or purchase of any franchise," Mich.

11. *See Morgan Walton Properties, Inc. v. International City Bank & Trust Co.*, 404 So.2d 1059, 1063 (Fla. 1981), *citing Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927); *Continental Mortgage Investors v. Sailboat Key, Inc.*, 395 So.2d 507, 509, 512-13 (Fla. 1981). See also the cases and authorities cited at p. 45 n.54 of the Brief of Appellee in the circuit court. Of course, as the forum, it is Florida's choice-of-law rule which governs this question, *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941), and in any event Mr. Rudzewicz has offered no demonstration that the substantive choice-of-law outcome would be any different in Michigan. And if it would be different, as we argued (Brief of Appellant at p. 43 n.64), that would only intensify Florida's interest in the administration of its own law: "In cases of true conflict—that is to say, situations in which more than one legal order is concerned with the controversy and the relevant policies of each differ so fundamentally that a mutually acceptable accommodation is impossible—a potential forum may well find a strong argument for taking jurisdiction in its preference for its own law and in its awareness that another jurisdiction's choice-of-law rules would point elsewhere." von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1130 (1966).

12. Preamble to act, 24 Mich. Comp. Laws Ann. (Supp. 1983-84, at p. 114).

Comp. Laws Ann. §445.1505 (Supp. 1983-84); and it provides that "[n]othing in this act shall limit a liability which may exist by virtue of any other statute or under common law if this act were not in effect," *id.*, §445.1534.[13]

Mr. Rudzewicz did not assert the applicability of Michigan law in his answer to Burger King's complaint (J.A. 140-46)—thus conceding the applicability of the forum's law, and waiving forever any contrary contention;[14] he invoked Michigan law only in support of his counterclaim against Burger King (J.A. 146-50). In this context, and given the limited reach of the act, its recognition would still leave substantial room for the application of Florida law on other issues. For all of these reasons, Mr. Rudzewicz' invocation of the Michigan act is not a significant factor in the jurisdictional equation.[15]

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13. It was only in this context that various Burger King officials acknowledged at trial that Burger King is subject to the Michigan act's requirements regarding information provided to prospective franchisees (*see* Appellee's Brief at 16-17). That is a condition of doing business in Michigan, but it does nothing to forestall enforcement of a contractual choice-of-law provision in any litigation between the parties after the franchise is formed.

14. *See Clarkson Co., Ltd. v. Shaheen*, 660 F.2d 506, 512 n.4 (2nd Cir. 1981), *cert. denied*, 455 U.S. 990 (1982); *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283, 296 n.7 (7th Cir. 1974); *Joseph E. Bennett Co. v. Trio Industries, Inc.*, 306 F.2d 546, 549 (1st Cir. 1962); *Gediman v. Anheuser Busch, Inc.*, 299 F.2d 537, 544 n.5 (2nd Cir. 1962). *See generally* 1A *Moore's Federal Practice, Part II*, §0.316[4] (1983). Florida follows this rule. *See Proprietors Ins. Co. v. Valsecchi*, 435 So.2d 290, 295 n.5 (Fla. 3rd DCA 1983), *review denied*, 449 So.2d 265 (Fla. 1984).

15. Mr. Rudzewicz's brief (pp. 17-18) also offers the gratuitous assertion that Burger King violated the Michigan act, for the sole reason that it assertedly failed to provide the franchisees with a copy of all proposed agreements at least 7 days before execution of any binding franchise agreement, or 7 days before the payment of any consideration, whichever comes first. Of course this has nothing to do with the jurisdictional question, but we cannot leave the accusation unanswered. The district

(Continued on following page)

Third and finally (brief at 38-41), Mr. Rudzewicz chooses to forego any discussion of this Court's decisions on the question of personal jurisdiction, in favor of four circuit court opinions—first offered to him in our Jurisdictional Statement as evidence of disagreement among the circuits (p. 28 n.48)—in support of the incredible proposition that "there is unanimity—and no conflict—on this personal jurisdiction issue among the [circuits represented in these opinions]" (Appellee's Brief at 38). Of course that pronouncement ignores the dozens of lower court decisions supportive of Burger King's position cited in the Jurisdictional Statement (p. 18 n.27, p. 19 n.28) and in the Brief of Appellant (p. 47 n.75).

Moreover, these four cases are readily distinguishable from this one. None involves the intimate interaction of the franchise and license relationship present here. Three originate in isolated purchases or leases of equipment, with no continuing involvement among the parties;[16] and the fourth[17] focuses not upon the more stable distributor rela-

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Footnote continued—

court found that the prospective franchisees were given copies of the lease and franchise agreements over four months before they were signed, and that Burger King did not violate the Michigan act or any other laws of Michigan, assuming *arguendo* that such laws applied (J.A. 158-59). The arguments and citations supporting that conclusion are found in the Brief of Appellee in the circuit court at pp. 6-12.

16. *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026 (5th Cir. 1983), *cert. denied*, ... U.S. ....., 104 S. Ct. 2180 (1984); *Scullin Steel Co. v. National Railway Utilization Corp.*, 676 F.2d 309 (8th Cir. 1982); *Telco Leasing, Inc. v. Marshall County Hospital*, 586 F.2d 49 (7th Cir. 1978) (per curiam). For example, as we pointed out in our Brief in Opposition to Motion to Affirm Judgment (p. 5 n.6), *Hydrokinetics* involved "only a single transaction . . . governed by Alaska law, which is the defendant's sole contact with the forum state [Texas]." 700 F.2d at 1029. Here we have an ongoing business relationship, governed by the law of the forum.

17. *Weller v. Cromwell Oil Co.*, 504 F.2d 927 (6th Cir. 1974).

tionship at issue, but solely upon the plaintiff's inability to show that the jurisdictional contacts were those of the individual defendants rather than their corporation, whose amenability to the court's jurisdiction was not contested. This decision only illustrates our point that every case must rest on its own facts (Brief of Appellant at 46 n.74), guided by the principles and refinements articulated by this Court. One could find support for any conclusion in the disparate lower court decisions, and we have certainly collected a majority for our position. We ask the Court to recognize the peculiar nature of this franchise relationship, and the extent to which the franchisees bargained not simply for the arms-length transmission of goods, but for the full range of benefits inherent in their participation in an interstate system.

2. *Burger King's Cause of Action Arose Out of Mr. Rudzewicz' Contacts With the Forum* (Brief of Appellant at 39-40). Mr. Rudzewicz offers no response to this contention.

3. *The Florida Court's Assertion of Jurisdiction Over Mr. Rudzewicz Was Not Otherwise Unfair.* Mr. Rudzewicz does not rebut the central observation on this point—that this Court has never undertaken to balance the various factors relevant to jurisdiction; to the contrary, its decisions suggest that where the defendant is found to have purposefully availed himself of the benefits and protection of the forum, it is appropriate to conclude that he voluntarily incurred any burdens attending the litigation. Nevertheless, we undertook such a balancing of interests (brief at 41-47), concluding that Florida has a clear interest in protecting the business expectations and reputation of its residents; that Florida has an interest in the application of its own law; that Burger King has an interest in litigating

in a convenient forum, and in assuring some uniformity of decisionmaking across its nationwide franchising operation; that Mr. Rudzewicz was not significantly burdened by defending in the Florida court; and that reversal of the circuit court's decision will not create the potential for unfairness in other cases. Of these five points, Mr. Rudzewicz addresses only the latter two.

First (Appellee's Brief at 18), in the least defensible of many indefensible assertions in his brief, Mr. Rudzewicz claims that "Burger King admitted, at trial, that it was burdensome for Rudzewicz to defend himself in Florida because many witnesses from its own Michigan regional headquarters, and others, would have to be brought to Miami at great expense to Rudzewicz (Tr. 574-575)." Neither the citation offered nor any other part of the transcript shows any such admission; and the incident referenced is the one acknowledged in our initial brief (p. 45 n.73)—in which Mr. Rudzewicz was having difficulty authenticating some documents (Tr. 574-75, 579), the trial court offered him as much time as might be necessary to secure the necessary authentication (Tr. 578, 582), and in that light Burger King stipulated to the authenticity of the documents (Tr. 598-99). This example demonstrates that Mr. Rudzewicz was *not* prejudiced by the necessity of litigating in Florida, and no other example is offered. The circuit court's suggestion to the contrary (J.A. 182) is totally unwarranted; there is literally no evidence of record that Mr. Rudzewicz' defense was hindered in any way. The mere inconvenience of traveling to Florida is irrelevant (Brief of Appellant at 45 n.69), and Burger King would be equally inconvenienced if required to litigate in Michigan.

Second (brief at 23-24), Mr. Rudzewicz echoes the circuit court's concern, discussed in the Brief of Appellant at

46, that judicial acknowledgement of jurisdiction in this case might create disturbing implications in other cases. Unlike the circuit court, Mr. Rudzewicz is not concerned with consumer transactions or franchisees owing smaller debts than in this case (J.A. 177, 178, 181). He is concerned that the recognition of jurisdiction in this case—creating a central location for the adjudication of claims arising out of Burger King franchises—might sanction a "car court" in Detroit or a "cola court" in Atlanta.

The short answer is that both examples involve distributorships—not franchises, which embrace a greater measure of interaction and control. This case involves a *franchise*—an arms-length commercial transaction between sophisticated businessmen, based on the premise that it makes good business sense for both parties to have a centralized, regulated operating structure—and by analogy a central forum in which to adjudicate disputes. This kind of relationship is pervasive in our society—reflecting the interdependent nature of our national economy—and there is no reason why a franchisee who solicits and accepts the benefits of such a system should not incur its burdens.

For other kinds of economic relationships, there may be other outcomes. In one sense, automobile or cola distributors are not unlike franchisees, in their reliance upon the good will of national organizations, and to that extent they participate willingly in an interstate network. If a forum clause in such cases would be enforceable (*see* Brief of Appellant at p. 29 n.37)—if the arms-length contractual accession to such jurisdiction violates no public-policy objective—then it seems to us that in proper cases, there is nothing unfair or inappropriate about a manufacturer's desire to adjudicate the terms and conditions of its distributor contracts in a single forum. We do not and need

not extend the arguments advanced here to other forms of business relationships, but we certainly see no frightening scenarios in the prospect. We re-emphasize in closing that every case depends on its own facts. Reversal of the circuit court's opinion will not open the floodgates; it will resolve this single controversy in a manner consistent with constitutional constraints. We submit that this process of balancing interests is not the appropriate perspective, but it supports our position anyway.[18]

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18. We also argued (brief at 47-48) that Mr. Rudzewicz waived his challenge to the district court's jurisdiction. Mr. Rudzewicz does not deny that he compromised and waived his right to appeal the trial court's finding of a trademark infringement (R. 804); that this waived any contention that the trial court lacked personal jurisdiction to adjudicate the trademark claims; and that there is no basis in substance for distinguishing between the propriety of the district court's exercise of jurisdiction over the trademark claims and the propriety of its exercise over the contract claims. Instead (brief at 24 n.35), Mr. Rudzewicz observes correctly that this question of waiver was not presented to the circuit court. However, Rule 34.1(a) of the Rules of the Supreme Court provides that this Court "may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide."

CONCLUSION

It is respectfully submitted that the decision of the circuit court should be reversed, and the cause remanded with instructions to affirm the district court's judgment.

Respectfully submitted,

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